IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

CHAMBER SUMMONS NO.625 OF 2004

IN

EXECUTION APPLICATION (L) NO.168 OF 2004

IN

SUIT NO. 4351 OF 2001

The Greater Bombay Cooperative Housing Society Ltd .... Plaintiff/ Judg.Creditors

versus

Lavlesh Klassic Developers Anr. ..... Defedants/ Judg. Debtors

Janak Dwarkadas with Ms. Snehal Paranjpe i/b. F. Rashmikant for the plaintiffs.
Mr. J. Chinoy with C.S. Kapadi i/b. Shah for the defendants.

CORAM: S.U. KAMDAR, J.

DATE : 22ND FEBRUARY, 2005.

P.C. :

1. The present chamber summons is taken out for diverse reliefs inter-alia for an execution of the

consent decree dated 10.1.2003. Some of the material facts of the present case are as under.

2. Some time in or about 1996 a proposal for development of the plot of land at Juhu was mooted by the plaintiff society. In pursuance thereof the plaintiff society in its general body meeting held on 20.7.1996 decided to enter into a Memorandum of understanding for development of the said plot of land at Juhu. The said plot of land was however reserved for public amenities and recreation ground. A proposal was therefore initiated by the plaintiff and the defendant builder for an exchange of the plot of land at Juhu with a plot of land situated at Mira Road of an aggregate area of 70,000 sq.ft to be utilised for construction of 168 residential flats alongwith necessary amenities.

3. On 30.10.96 a MOU was entered into between the plaintiff and the defendant.

4. The said MOU inter alia provided that the

defendant will construct on a plot of land at Mira Road various residential flats, community hall, common area and facilities. It is further provided that the said construction of the tenaments at Mira Road will be completed within the time bound schedule. In consideration thereof the builder was hand over a plot of land belonging to the plaintiff at Juhu. The said plot of land was to be utilised by the builder for construction of a club known as ‘Club Millenium’.

5. It was agreed in the said MOU that the defendant will be given free of cost residential flats and 168 residential tenements with all amenities and 135 membership forms will be given by the defendant to the plaintiff in the said proposed club free of cost. It was also agreed that the said 135 membership given to the plaintiff society the same will be be non-transferable. In the said MOU the properties at Juhu stood exchanged with the Mira Road project of the defendant herein. On 10.4.1998 a resolution was passed by the plaintiff for exchange

of all rights in exchange of plot of land.

6. On 3.5.1998 a final agreement was arrived at between the plaintiffs and the defendants. It seems that there were breaches and the Mira Road project could not be developed within a period of twelve months as contemplated therein.

7. Consequently on 13.12.2001 the plaintiffs filed the suit being Suit no. 435 of 2001 in this court seeking specific performance of the said agreement dated 3.5.1998 in respect of the Mira Road project and various other reliefs. In that suit ultimately consent terms were arrived at on 10.1.2003 which is a subject matter of the present execution application. Present chamber summons is taken out for execution of the said consent decree by claiming diverse reliefs.

8. The said consent terms dated 10.5.2001 inter-alia provides as under :

"2. Agreed and ordered that defendant no.1 do deposit a sum of Rs.2.5 crore (Rupees Two Crore Fifty Lacs only) on or before 28th February, 2003 in the said bank account and further agrees to deposit a further sum of Rs.1.00 Crore (Rs. One Crore only) on or before 30th April, 2003 and further sum of Rs.1.00 crore (Rupees One Crore only) on or before 30th July, 2003 and further sum of Rs.50,00,000/- (Rupees Fifty Lacs only) on or before 30th October, 2003 in the said bank account to be utilised for completing the balance work at Mira Road on the property described in Annexure'A' hereto.

3. It is further agreed confirmed and declared that :

(i) Defendant no.1 shall complete the Mira Road Project on or before 15th November, 2003 with a grace period of 9 months by utilizing the amounts deposited in the Bank Account to be opened as stated in clause 2 above.

(ii) If defendant no.1 fails to complete the project within the period stipulated hereinabove, defendant no.1 will not be entitled to operate the said bank account which shall be then operated by two of the plaintiffs authorized signatories only and the plaintiffs alone shall be entitled to appoint an independent team of persons for completion of the project.

7. Agreed, confirmed and declared that the defendant no.1 do hereby deposit simultaneously with the execution of these terms with the advocates for the plaintiffs M/s. Federal and Rashmikant 250 blank

membership forms duly approved and relevant blank certificates duly signed by the persons authorised to sign by defendant no.1 for enrolment of Family Membership of Club Millenium Juhu as per the resolution dated 31st December, 2001 passed by the defendant no.1 and the said M/s. Federal and Rashmikant shall release upto 200 of such forms and re relevant certificates to defendant no.1 through its advocate only id if defendant no.1 deposits in the aforesaid joint account Rs.2.50 lacs (Rupees Two Lacs Fifty Thousand only) per form. On release of each forms and relevant certificate by M/s. Federal & Rashmikant as aforesaid defendant no.1 shall be corresponding absolutely entitled to enroll one member of Club Millennium Juhu against the release of such forms and Certificate by M/s. Federal & Rashmikant for such membership fee subscription and deposit and on such terms and conditions as defendant no.1 may deem fit without in any way accounting for the same to the plaintiffs. If the defendant no.1 fails to deposit the amount mentioned in para-2 above on its due date the said M/s. Federal and Rashmikant shall be corresponding entitled to release the said 200 Forms and relevant certificates to the plaintiff no.1 less such form and certificates that may have been released to the defendant no.1 against deposit of Rs.2.50 lakhs as aforesaid and the plaintiff no.1 shall be entitled to admit new members of Club Millennium Juhu for such fees but not less than Rs.2.50 lakhs per member and fill in the name of the new member in such certificates and deposit the said fees in aforesaid joint account and utilize the said fees for completing the remaining construction of Mira Road Project. The defendant no.1 shall accept such members as duly enrolled members of Club Millenium Juhu.

8. Agreed, confirmed and declared that any short fall between the fees collected arising out of enrollment of the said 200

members of Club Millenium Juhu and the amount required for completion of Mira Road project will be brought in by the defendants who agrees to deposit the full extent of the shortfall on or before 15th November, 2003.

13. Agreed confirmed and declared that the remaining 50 forms with relevant certificates shall be retained by M/s. Federal & Rashmikant, Advocates for the plaintiffs and will be released to defendant no.1 through their advocate on compliance of the defendants obligations mentioned in paragraphs 11 and 12 hereinabove. If the defendant no.1 fails to comply with the obligation mentioned in paragraphs 11 and 12 hereinabove, the said M/s. Federal & Rashmikant shall be entitled to release the said 50 forms and relevant certificate to the plaintiff no.1 and the plaintiff no.1 shall be entitled to admit new members of Club Millenium Juhu for such fees as the plaintiffs may deem fit and deposit the said fees in the said joint bank account and utilize such fees for completion of Mira Road project. On compliance of the obligation referred to in paragraphs 11 and 12 hereinabove by defendant no.1 M/s. Federal and Rashmikant shall release the said 50 forms and relevant certificates to the defendant no.1 less such forms and certificate that may have been released to the plaintiffs.

9. The scheme of the consent terms contemplates that the defendant has to deposit a sum of Rs.5 crores on the different dates as provided under clause-2 thereof. The said amount was supposed to be deposited for the purpose of construction of the

tenaments at the Mira Road project. Under clause-3 thereof it was provided that the defendant shall complete the said Mira Road project on or before 15.11.2003 with a grace period of 9 months by utilising the amount deposited as provided in sub-clause (i) of clause-2 of the consent terms. Clause-3 provides that if the defendant fails to complete the project within the period stipulated herein above the defendant no.1 will be entitled to operate the said bank account which is specifically open under clause 2 of the consent terms. It is also provided thereunder that the plaintiff shall be entitled to appoint an independent team of persons for the purpose of completion of the said project. Under clause-7 it is provided that the defendant no.1 will deposit with the advocates of plaintiffs 250 blank membership forms of 'Club Millenium' duly approved. It is provided that in an event of default on the part of defendant no.1 to deposit the said amount of Rs.5.00 crores as contemplated in clause-2 the said 200 forms out of 250 forms shall be released by the advocates for plaintiffs to the various persons to become a member of the proposed club

Millenium at the plot of land at Juhu. The said forms will be sold by the plaintiffs for an amount of not less than Rs.2,50,000/- It was contemplated in clause-7 that the said amount of Rs.2.50 lacs for each form which will aggregate for the fees of 200 members will bring in a sum of Rs.5.00 crores. It was provided that the said amount which is recovered by sale of the forms would be deposited in the joint account which is opened under clause-1 of the consent terms and the same will be used for completing the said construction of the Mira Road project. It has been provided under clause-7 that defendant no.1 shall accept members enrolled by the plaintiff as duly enrolled members of 'Club Millenium' without any question or challenge. Clause-8 of the consent terms further provided that in an event if there is deficiency in the amount for completion of the project at Mira Road i.e. if the project required over and above Rs.5.00 crores arising out of enrollment of the said 200 members then in that event the defendant shall bring in the balance amount in the kitty for the purpose of completion of the said contract. Under clause-13 it is provided that

balance 50 forms will be retained by the plaintiffs advocate till and until the defendant complies with its obligations as contemplated under clause 11 and 12 of the said consent terms which inter-alia provides for demarcation of boundaries of the said plot of land at Miraroad and for obtaining occupation certificate from the BMC. Under clause-12 it was provided that defendant no.1 shall make out marketable title and convey the property to the plaintiff and if there is default on the part of defendant no.1 as contemplated in clause11 and 12 then in that event the plaintiff will be entitled to utilise the amount recovered by further disposing off and releasing the said remaining 50 membership forms of 'Club Millenium'. The reading of clause 2, 3, 7, 8, 11, 12 and 13 provides an integrated scheme for the development of the Mira Road project. Under the said scheme it is provided that initially the defendant will bring in required 5 crores and on its failure to do so the plaintiff will bring in the amount by selling the said forms 'Club Millenium'. The remedy for the default is also contemplated therein by which the amount shall be brought in by

distributing the forms to the plaintiff society and the plaintiff society is entitled to carry out construction on the Mira Road project from the sale proceeds of the said forms. A further provisions are made under clauses of the consent terms that even if there is no final conveyance then in that event also the defendant no.1 will be liable and on his failure to grant conveyance the balance 50 forms will be released and the membership will be granted for the purpose of recovery of an additional amount of not less than Rs.50 lacs.

10. The learned counsel for the plaintiffs in support of the application has contended that admittedly there is default on the part of defendant no.1 to bring in the necessary funds of the sum of Rs.5 crores as contemplated under the consent terms. He further contended that it is an admitted position that there is a default on the part of the defendant no.1 to complete the project at Mira Road of construction of 168 residential tenements within the stipulated period of time as provided under clause-3 of the said consent terms. He thus contended that in

view of defaults on the part of the defendant no.1 the plaintiffs will be entitled to execute the said consent decree and also entitled to various reliefs as claimed in the chamber summons. In so far as clause-7 of the consent terms is concerned the learned counsel for the plaintiff has contended that though it is true that out of 250, 200 membership forms are released by the plaintiffs advocate but it is contended that they were unable to dispose off the said membership forms and gather the requisite amount of Rs.5.00 crore as contemplated in clause-7 thereof. It is contended that there are no members who are willing to become members of the Club Millenium because the defendant no.1 has failed to provides necessary amenities which was represented by him in the brochures and thus clause-7 could not be operated upon. It has been contended by the learned counsel for the plaintiffs that under the terms and conditions of the consent terms the obligation on the part of defendant no.1 to bring an amount of Rs.5.00 crores as provided in clause 2 is an absolute and not dependent upon and or shifted upon the plaintiffs by virtue of clause-7 of the consent terms. It has been

contended that the provision of clause-7 of the consent terms is merely an additional safeguard and does not discharge the obligations on the part of defendant no.1 to bring the aforesaid amount of Rs.5 crores as contemplated under clause-2 therein.

11. On the other hand learned counsel appearing for defendant no.1 has contended that the consent terms itself provides for a consequence for default and or for non-compliance with clause-2 and 3. It has been contended that once the consent terms provides for consequence then the remedy of execution of the decree has to be in accordance with the tennor of the terms and conditions set out therein and not independent as sought to be contended by the learned counsel for the plaintiff. In so far as sum of Rs.60,000/- additionally claimed by the defendant as entrance fees over an above Rs.2.50 lakhs for the forms released by the plaintiffs is concerned the defendant has fairly conceeded that the said amount is only towards the entrance fees but the same is not provided in the consent terms and therefore it will not be insisted upon. He has further stated that the

amount of Rs.60,000/- is collected only in respect of two of the members of which the plaintiff have asked defendant no.1 to enroll and for which he is willing to give necessary credit. He further makes it clear that in so far as membership collected by the defendant themselves are concerned he will collect Rs.60,000/- extra but in so far as the membership enrolled by the plaintiffs are concerned he will not insist on such additonal amount and he will deposit entire Rs.2.50 lakhs as contemplated under clause-2 and 7 of the consent terms.

12. Mr. Chinoy also made a statement that till and until the said project is completed under the terms and conditions of the consent terms he will not enroll any new members of the said Club Millennium.

13. I have considered the rival submissions of the parties. The contention of Mr. Dwarkadas learned counsel for the plaintiff that the scheme of consent terms under clause-2, 3,7 and 8 contemplates that the obligation on the part of defendant no.1 to bring a sum of Rs.5.00 crores is absolute cannot be accepted

for the simple reason because clause-7 provides as under :

> ". If the defendant no.1 fails to deposit the amount mentioned in para 2 above on its due date the said M/s. Federal and Rashmikant shall be corresponding entitled to release the said 200 Forms and relevant certificates to the plaintiff no.1 less such form and certificates that may have been released to the defendant no.1 against deposit of Rs.2.50 lakhs as aforesaid and the plaintiff no.1 shall be entitled to admit new members of Club Millennium Juhu for such fees but not less than Rs.2.50 lakhs per members and fill in the name of the new member in such certificates and deposit the said fees in aforesaid joint account and utilize the said fees for completing the remaining construction of Mira Road Project. The defendant no.1 shall accept such members as duly enrolled members of Club Millennium Juhu."

14. The para reproduced in clause-7 makes it clear that obligations of the plaintiffs and defendants are reciprocal obligations. In an event of default on the part of defendant no.1 to bring a sum of Rs.5.00 crores the consent terms expressly provides that the said deficit will be made good by distribution of forms and the said amount released will be utilised for the completion of the project at Miraroad. In view of the express provisions of the consent terms

it is not possible for me to accept the contention that the distribution of forms and recovery of an amount of Rs.2.5 lacs each form totalling to Rs.5 crores is only an additional safeguard. In my opinion the scheme of the consent terms itself provides for an alternative. Firstly, the defendant no.1 is required to carry out his obligation and on failure to do so the consent terms provided for recovery of necessary funds by distribution of forms by the plaintiffs to put in necessary funds of a sum of Rs.5.00 crores. Even in respect of completion of the project the safeguards are provided by virtue of various terms and conditions of the consent terms, in view thereof it is not possible for the court to execute the said consent decree in a manner otherwise thus what is provided for therein. It is well settled that this court as executing court cannot go behind the terms of the said consent decree and therefore I am not inclined to accept the contention of Mr. Dwarkadas that I should ignore the express terms of the consent terms and grant reliefs which are sought in the present chamber summons including the appointment of court receiver and directions

against the defendant no.1 to take all steps to complete the construction and or bring in the amount. In view thereof I do not find any merits in the chamber summons and dismiss the same.

sd/-

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